

- ☐ For Information
☐ For Discussion
☒ For Decision Making

BOARD OF EQUALIZATION
INFORMAL ISSUE PAPER

AB 178
California Cigarette Fire Safety and Firefighter Protection Act
(Self-Extinguishing Cigarettes)

Issue

Implementation of Assembly Bill 178.

Alternative Staff Recommendations

Alternative 1: Board staff should commence efforts to comply with the legislative intent of the Act and provide minimal implementation, as set forth in the attached flow chart (Exhibit A), and seek “clean up” legislation to clarify more specifically the duties and responsibilities of the Board and to provide an adequate level of funding.

Alternative 2: Board staff should delay implementation the Act until current vagueness in its provisions and lack of funding are cured by the Legislature and clarification is obtained, setting forth clearly the duties and responsibilities of the Board and an adequate level of funding.

Background

Assembly Bill 178 (Koretz) was enacted on October 7, 2005 (Stats. 2005, Ch. 633). The bill adds Part 8 (commencing with Section 14950) to Division 12 of the Health and Safety Code as the California Cigarette Fire Safety and Firefighter Protection Act (the Act). As stated in uncodified Section 1 of the bill, the intent of the bill is to reduce the likelihood that cigarettes will cause fires, which result in deaths, injuries, and property damage. (Exhibit B).

Current Requirements.

Effective January 1, 2007, the Act prohibits any person from selling, offering, or possessing for sale in this state cigarettes that do not comply with the following requirements:

- (1) testing by the manufacturer in accordance with the prescribed test method;
- (2) specified performance standards;

- (3) the marking requirement; and,
- (4) the filing of a written certification by the manufacturer with the State Fire Marshal.

(Exhibit C, brief description of the certification, testing and marking requirements).

Penalties for Violation.

Any manufacturer or any other person or entity that knowingly sells or offers to sell cigarettes, other than through retail sale, in violation of the Act, is subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each sale.

Any retailer, distributor, or wholesaler that knowingly sells or offers to sell cigarettes in violation of the Act would be subject to the following:

- A civil penalty not to exceed five hundred dollars (\$500) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale does not exceed 50 packages of cigarettes.
- A civil penalty not to exceed one thousand dollars (\$1,000) for each sale, or offer for sale, in which the total number of cigarettes sold or offered for sale exceeds 50 packages of cigarettes.

In addition to any other penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification is subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each false certification.

Any person violating any other provision of the Act is subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation. The civil penalties are to be deposited in the Cigarette Fire Safety and Firefighter Protection Fund newly created by the Act.

However, it is a defense in any action for civil penalties that a distributor, wholesaler, retailer, or any person in the stream of commerce relied in good faith on the manufacturer's marking indicating that the cigarettes comply with the requirements of the Act.

Implementation of Penalties: The Act does not state whether the Fire Marshal or the Board issues civil citations and/or impose penalties, nor does it address any later appeals process. Rather, the language omits any reference to the agency or person required to execute the foregoing penalties and omits any reference to appeals. This lack of specificity was noted in the Board's Legislative Analysis. (Exhibit D).

Enforcement of Current Requirements and Appeals.

The Act does expressly provide that the Board's Investigations Division inspectors, upon presentation of the appropriate identification and credentials, are authorized to enter into, and to conduct an inspection of, any building, facility, site, or any place where cigarettes are sold, offered for sale, or stored or at any site where there is evidence of a violation of specified requirements of the Act. As such, manufacturers, distributors, wholesalers, and retailers are required to allow such inspections by BOE investigators/inspectors.

Further, the Act expressly provides that any person refusing to allow an inspection is subject to a civil penalty up to a maximum of one thousand dollars (\$1,000) for each failure or refusal. The Board or other law enforcement agency is also expressly authorized to seize cigarettes upon discovery that a business engaged in cigarette sales either offers or possesses for sale, or has made a sale of, cigarettes in violation of specified compliance requirements of the Act.

The Act does not specify however, what actions must be followed with respect to the seized cigarettes. Health & Safety Code section 14955, subdivision (e) does provide that:

“[a]ny cigarettes . . . that do not comply with the performance standard required by Section 14952 shall be deemed contraband and subject to seizure and disposal by the board or a law enforcement agency.” (Emphasis added).

In that regard, section 14957 provides “permissive” language, which in part states that:

“the board or that law enforcement agency may seize those cigarettes possessed in violation of this part.” (Emphasis added).

In short, neither statute mandates seizure or specifies how the cigarettes will be handled once seized. Further, neither statute addresses whether the seized cigarettes are to be forfeited to the state, or whether an appeals process is provided to allow review of the seizure.

Appeals.

The persons subject to substantial penalties and seizure of their property should have the opportunity to challenge the validity of the seizures and imposition of applicable penalties, consistent with due process requirements. A government agency’s authority to take a person’s property is subject to limitations imposed by state and federal constitutions. The state and federal constitutions expressly provide that a person may not be deprived of certain rights (life, liberty, or property) without “due process of law.” (Cal. Const., art. I, § 7; U.S. Const. 5th and 14th Amends.). Procedural due process requires a government agency to provide a fair appeals process including notice and a hearing to any person whose property has been taken by that agency. Substantive due process requires laws authorizing property seizures to be fair and reasonable and to further a legitimate governmental objective, which is intended to protect a person’s property from unfair governmental interference or taking. Thus, the Board staff’s seizure of cigarettes noncompliant with the Act would necessitate providing an appeals process.

The absence of legislative direction on these issues was noted in the Board’s Legislative Analysis. (Exhibit D).

Discussion of Recommended Alternatives

The Board’s objective is nevertheless to administer and enforce the tax and fee laws under its jurisdiction as constitutionally prescribed. As such, the Board staff has sought to work in cooperation and coordination with the State Fire Marshal regarding administration of the Act. As discussed above, however, because the Act lacks specificity regarding the respective responsibilities of the State Fire Marshal and/or the Board, and additionally, provides only minimal funding, both the State Fire Marshall and Board staff have encountered significant difficulties in determining an implementation methodology. Uncodified language (SEC. 3), indicates that the Act creates the Cigarette Fire Safety and Firefighter Fund and provides that, upon appropriation by the

Legislature, moneys deposited into the fund shall be made available to the Board to “offset minor administrative costs for inspecting, seizing, and disposing of cigarettes.” (Emphasis added). Thus, no start up funding is provided for either agency and all initial costs must be absorbed.

The Legal Department and the Investigations Division staff have met several times with representatives of the State Fire Marshal’s Office (SFM), including its Chief Counsel, to discuss detailed implementation of the Act. After substantial exchange of information and lengthy discussion, the representatives for both agencies agreed that an appropriate and effective means of implementing the new program would be to divide the responsibilities, based on the current minimal parameters in the statute and each agency’s expertise. SFM, therefore, would be responsible for three administrative duties: certification of self-extinguishing cigarettes, package marking and approval of package marking. The Board staff would handle two duties: inspection and seizure of non-compliant product (including an abbreviated appeal). The seizure and appeal would be limited in that they will result from Board inspections only. (Exhibit A, flow chart).

Alternative 1 proposes implementing the legislative intent with the required elements of the Act as they relate to the Board. This would encompass inspection and seizures of non-compliant product by the Board. If the inspection results in only non-compliant product under the Act, an abbreviated appeals process is provided to comply with constitutional due process requirements. Board staff, however, anticipates very few instances when the product would be seized for a violation of the Act only. Instead, the seizures will likely occur for violations of the Cigarette and Tobacco Licensing Act of 2003 (Licensing Act). In those instances the citation and seizure would proceed under the current procedures for the Licensing Act and a notation would be made in the Inspector’s report that the product was additionally non-compliant with the Act. Board staff’s execution of the alternative, however, depends on SFM staff certifying cigarettes and package marking, approval of package marking and providing this information to the Board. This alternative is recommended as it complies with the legislative intent of reducing the likelihood that cigarettes will cause fires by ensuring that product not compliant with the Act is taken out of the market place. Also, this alternative allows for the opportunity to obtain legislation to provide adequate funding and clarify ambiguous provisions and omissions in the Act.

Alternative 2 proposes delaying implementation while awaiting Legislative clarification. This proposal gives the appearance, however, of the Board not enforcing an arguably mandated duty. If the delay was perceived as unreasonable, this could potentially result in an action against the Board and a waiver of its governmental immunity for failure to discharge a mandatory duty. (See Gov. Code, § 815.6.)

In conjunction with any Board action regarding implementation of the Act, staff recommends the Board support and/or sponsor legislation to clarify ambiguous provisions and address omissions of the Act. The proposed cleanup legislation should;

- clarify agency responsibilities;
- authorize the Board to dispose of seized cigarettes that are found to violate any of the four requirements in section 14951, subd.(a);
- specify forfeiture for seized product found to violate the Act;
- provide sufficient funding to pay for both agencies’ administration and enforcement of the Act; and,
- require the State Fire Marshal to list manufacturers who have met the marking and certification requirements on its website. This information would be helpful to the public, the industry and Board staff responsible for conducting inspections of cigarettes to ensure compliance with the Act.

Requested Board Action

Staff is requesting Board approval of either staff recommendation Alternative 1 or Alternative 2, or other direction.

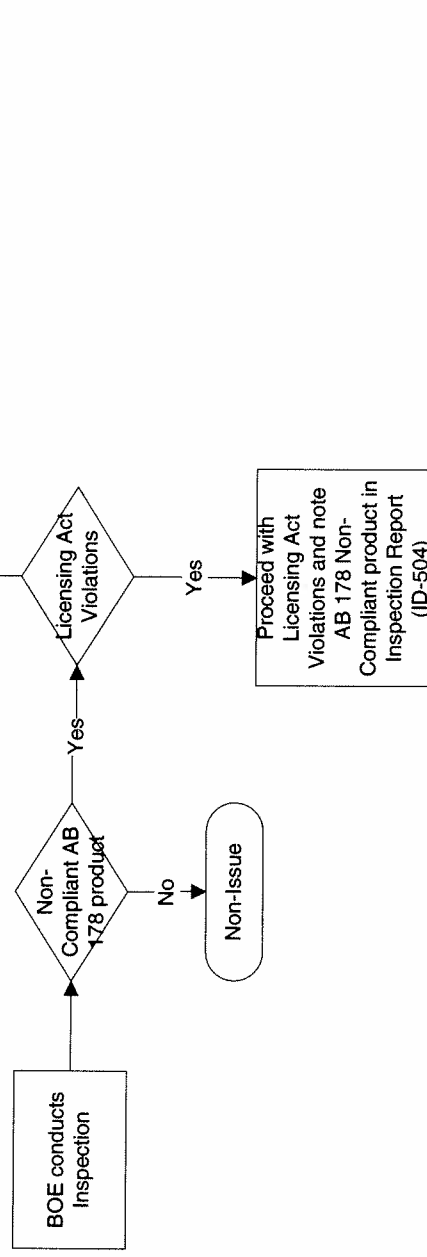
EXHIBIT A

AB 178 Self Extinguishing Cigarettes Draft Implementation Process

State Fire Marshal



Board of Equalization



BOE

State Fire Marshal

EXHIBIT B

Assembly Bill No. 178

CHAPTER 633

An act to add Part 8 (commencing with Section 14950) to Division 12 of the Health and Safety Code, relating to cigarettes.

[Approved by Governor October 7, 2005. Filed with
Secretary of State October 7, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

AB 178, Koretz. California Cigarette Fire Safety and Firefighter Protection Act.

Existing law requires the State Fire Marshal to adopt regulations that specify standards for the special design of cigarette lighters with respect to safety features that prevent operation of the lighters by children 5 years of age or younger.

This bill would prohibit the sale of cigarettes unless the manufacturer of those cigarettes certifies to the State Fire Marshal that the cigarettes have been tested by the manufacturer in accordance with standards established by the American Society of Testing and Materials and no more than 25% of the cigarettes it manufactures exhibit full-length burns when tested. The bill would require cigarette manufacturers to mark packages of cigarettes to be sold in California to show compliance with these provisions and would require manufacturers, distributors, wholesalers, and retailers to permit an employee of the State Board of Equalization to inspect these markings. Failure or refusal to allow an inspection would subject a person to a civil penalty not to exceed \$1,000.

The bill would impose specified civil penalties on manufacturers, distributors, wholesalers, retailers, and others who knowingly sell or offer to sell cigarettes in violation of these provisions and on manufacturers that knowingly make false certifications in violation of these provisions. The bill would require these civil penalties to be deposited in the Cigarette Fire Safety and Firefighter Protection Fund, which the bill would create in the State Treasury, and would make moneys in the fund, upon appropriation by the Legislature, available to the State Board of Equalization to offset costs for inspecting, seizing, and disposing of cigarettes and to the State Fire Marshal to offset costs for implementation and reporting.

The bill would become inapplicable if federal fire safety standards that preempt these provisions are enacted and the State Fire Marshal so notifies the Secretary of State.

The bill would become operative on January 1, 2007.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares as follows:

(1) Cigarettes are the leading cause of fire deaths in the United States each year, claiming 1,000 lives and causing nearly 2,000 injuries and nearly four hundred million dollars (\$400,000,000) in direct property damage.

(2) Technology exists to significantly reduce the number of fires caused by cigarettes.

(3) The State of New York enacted a cigarette fire safety regulation effective June 28, 2004, that requires cigarettes sold in that state to meet a fire safety performance standard. Canada is scheduled to implement the New York State fire safety standard in the fall of 2005.

(4) New York State's cigarette fire safety standard is based upon decades of research by the National Institute of Standards and Technology, congressional research groups, and private industry.

(5) Cigarettes meeting fire safety standards have been found not to increase the costs to consumers.

(6) It is the intent of the Legislature to adopt the cigarette fire safety standard that is in effect in New York State to reduce the likelihood that cigarettes will cause fires, which result in deaths, injuries, and property damage. It is further the intent of the Legislature to adopt this cigarette fire safety standard with a minimum of cost to the state.

(b) The Legislature hereby determines that it is within the police powers of the state to protect the health and safety of the people of the state by establishing fire safety standards for cigarettes sold in this state.

SEC. 2. Part 8 (commencing with Section 14950) is added to Division 12 of the Health and Safety Code, to read:

PART 8. CIGARETTES

14950. (a) This part shall be known and may be cited as the California Cigarette Fire Safety and Firefighter Protection Act.

(b) As used in this part, the following terms have the following meanings:

(1) "Board" means the State Board of Equalization.

(2) "Cigarette" means a cigarette as defined in Section 30003 of the Revenue and Taxation Code.

(3) "Distributor" means a distributor as defined in Section 30011 of the Revenue and Taxation Code.

(4) "Manufacturer" means any of the following:

(A) An entity that manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced anywhere that the manufacturer intends to be sold in the state, including cigarettes intended to be sold in the United States through an importer.

(B) The first purchaser anywhere that intends to resell in the United States cigarettes manufactured anywhere that the original manufacturer or maker does not intend to be sold in the United States.

(C) An entity that becomes a successor of an entity described in subparagraph (A) or (B).

(5) “Offer to sell” means to offer or agree to sell.

(6) “Package” means package as defined in Section 30015 of the Revenue and Taxation Code.

(7) “Quality control and quality assurance program” means the laboratory procedures implemented to ensure that operator bias, systematic and nonsystematic methodological errors, and equipment-related problems do not affect the results of the testing. This program ensures that the testing repeatability remains within the required repeatability values stated in paragraph (5) of subdivision (a) of Section 14952 for all test trials used to certify cigarettes in accordance with this part.

(8) “Repeatability” means the range of values within which the repeat results of cigarette test trials from a single laboratory will fall 95 percent of the time.

(9) “Retailer” means a person who engages in the sale of cigarettes, but not for the purpose of resale.

(10) “Sale” or “sell” means any transfer, exchange, or barter, in any manner or by any means whatever, or any agreement for these purposes. The giving of cigarettes as samples, prizes, or gifts, and the exchanging of cigarettes for any consideration other than money are considered sales.

(11) “Stamp and meter impression” means stamp and meter impression as defined in Section 30018 of the Revenue and Taxation Code.

(12) “Wholesaler” means a wholesaler as defined in Section 30016 of the Revenue and Taxation Code.

14951. (a) A person shall not sell, offer, or possess for sale in this state cigarettes not in compliance with the following requirements:

(1) The cigarettes are tested by the manufacturer in accordance with the test method prescribed in subdivision (a) of Section 14952.

(2) The cigarettes meet the performance standard specified in subdivision (b) of Section 14952.

(3) The cigarettes meet the marking requirement of Section 14954.

(4) A written certification is filed by the manufacturer with the State Fire Marshal in accordance with Section 14953.

(b) This section does not prohibit distributors, wholesalers, or retailers from selling their inventory of cigarettes existing on January 1, 2007, if both of the following conditions are met:

(1) The distributors, wholesalers, or retailers can establish that California tax stamps or meter impressions were affixed to the cigarettes pursuant to Section 30163 of the Revenue and Taxation Code before January 31, 2007.

(2) The distributors, wholesalers, or retailers can establish that the inventory was purchased before January 1, 2007, in comparable quantity to the inventory purchased during the same period of 2005.

(c) This section does not prohibit a person or entity from manufacturing or selling cigarettes that do not meet the requirements of subdivision (a) if the cigarettes are or will be stamped or metered for sale in another state or are packaged for sale outside the United States.

14952. (a) (1) Testing of cigarettes shall be conducted in accordance with the American Society of Testing and Materials (ASTM) Standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes." However, a subsequent ASTM Standard Test Method may be adopted upon finding that the subsequent method does not result in a change in the percentage of full-length burns exhibited by any tested cigarette when compared to the percentage of full-length burns that the same cigarette would exhibit when tested in accordance with ASTM Standard E2187-04 and the testing requirements in paragraphs (2) to (5), inclusive, and the performance standard specified in subdivision (b).

(2) Testing shall be conducted on 10 layers of filter paper.

(3) Forty replicate tests shall comprise a complete test trial for each cigarette tested.

(4) The performance standard required by subdivision (b) shall only be applied to a complete test trial.

(5) Laboratories conducting testing in accordance with this subdivision shall implement a quality control and quality assurance program that includes a procedure that will determine the repeatability of the testing results. The repeatability value shall be no greater than 0.19 pursuant to subdivision (b).

(b) When tested in accordance with subdivision (a), no more than 25 percent of the cigarettes tested in a test trial shall exhibit full-length burns.

(c) Each cigarette listed in a certification submitted pursuant to Section 14953 that uses lowered permeability bands in the cigarette paper to achieve compliance with the performance standard set forth in subdivision (b) shall have at least two nominally identical bands on the paper surrounding the tobacco column. At least one complete band shall be located at least 15 millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design, there shall be at least two bands fully located at least 15 millimeters from the lighting end and 10 millimeters from the filter end of the tobacco column or 10 millimeters from the labeled end of the tobacco column for a nonfiltered cigarette.

(d) The manufacturer or manufacturers of a cigarette that cannot be tested in accordance with the test method prescribed in subdivision (a) may employ a test method and performance standard for that cigarette that is equivalent to the performance standard prescribed in subdivision (b). The manufacturer or manufacturers may employ that test method and performance standard to certify that cigarette pursuant to Section 14953. All other applicable requirements of this part shall apply to the manufacturer or manufacturers of that cigarette.

(e) This section does not require additional testing if cigarettes are tested consistent with this section for any other purpose.

(f) In order to ensure compliance with the performance standard specified in subdivision (b), data from testing conducted by manufacturers to comply with this performance standard shall be kept on file by these manufacturers for a period of three years after the initial date of certification and for a period of three years after each recertification required by subdivision (c) of Section 14953 and shall be sent to the State Fire Marshal and the Attorney General upon his or her request.

(g) This section shall be implemented in accordance with the implementation and substance of the New York Fire Safety Standards for Cigarettes that are effective on June 28, 2004.

14953. (a) Each manufacturer shall submit a written certification to the State Fire Marshal attesting that each cigarette listed in the certification has been tested in accordance with subdivision (a) of Section 14952 and meets the performance standard set forth in subdivision (b) of that section.

(b) Each cigarette listed in the certification shall be described with the following information:

- (1) Brand.
- (2) Style (for example, light, ultra light).
- (3) Length in millimeters.
- (4) Circumference in millimeters.
- (5) Flavor (for example, menthol, chocolate) if applicable.
- (6) Filter or nonfilter.
- (7) Package description (for example, soft pack, box).
- (8) Marking approved in accordance with Section 14954.

(c) Each cigarette certified under this section shall be recertified every three years.

(d) Manufacturers certifying cigarettes in accordance with this section shall provide a copy of the certifications to all distributors and wholesalers to which they sell cigarettes and shall also provide sufficient copies of an illustration of the cigarette packaging marking utilized by the manufacturer pursuant to Section 14954 for each retailer to which the distributors and wholesalers sell cigarettes. Distributors and wholesalers shall provide a copy of these cigarette packaging markings received from manufacturers to all retailers to which they sell cigarettes.

14954. (a) Cigarettes that are certified by a manufacturer in accordance with Section 14953 shall be marked on the packaging and case to indicate compliance with the requirements of this part. Marking shall be in 8-point type or larger and consist of one of the following:

(1) Modification of the universal product code to include a visible mark printed at or around the area of that code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the universal product code.

(2) Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette packaging or cellophane wrap.

(3) Printed, stamped, engraved, or embossed text on the cigarette packaging that indicates that the cigarettes meet California standards.

(b) Before a certified cigarette can be sold in the state, a manufacturer shall submit its proposed marking to the State Fire Marshal. The State Fire Marshal shall approve the marking upon a finding that it is compliant with the criteria outlined in subdivision (a). Proposed markings shall be deemed approved if the State Fire Marshal fails to act within 10 business days of receiving a proposed marking. A marking in use and approved for the sale of cigarettes in the State of New York shall be deemed approved.

(c) A manufacturer must use only one marking and must apply this marking uniformly for all packagings, including, but not limited to, packages, cartons, and cases, and brands marketed by that manufacturer.

(d) A manufacturer who modifies its marking shall notify the State Fire Marshal of this change and submit to the State Fire Marshal a copy of the new marking which shall comply with subdivisions (a) and (b).

14955. (a) Any manufacturer or any other person or entity that knowingly sells or offers to sell cigarettes other than through retail sale in violation of this part is subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each sale.

(b) Any retailer, distributor, or wholesaler that knowingly sells or offers to sell cigarettes in violation of this part shall be subject to the following:

(1) A civil penalty not to exceed five hundred dollars (\$500) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale does not exceed 50 packages of cigarettes.

(2) A civil penalty not to exceed one thousand dollars (\$1,000) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale exceeds 50 packages of cigarettes.

(c) The civil penalties imposed pursuant to subdivisions (a) and (b) of this section shall be deposited in the Cigarette Fire Safety and Firefighter Protection Fund.

(d) In addition to any other penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification pursuant to Section 14953 shall be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each false certification.

(e) Any person violating any other provision in this part shall be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation. Any cigarettes that have been sold or offered for sale that do not comply with the performance standard required by Section 14952 shall be deemed contraband and subject to seizure and disposal by the board or a law enforcement agency.

(f) The Attorney General may bring an action on behalf of the people of the state to restrain further violations of this part and for any other relief that may be appropriate. In any action by the Attorney General to enforce this act, the Attorney General shall be entitled to recover costs of investigation, expert witness fees, costs of the action, and reasonable attorney's fees.

(g) It shall be a defense in any action for civil penalties, that a distributor, wholesaler, retailer, or any person in the stream of commerce

relied in good faith on the manufacturer's certificate or marking that the cigarettes comply with the requirements of this part.

14956. (a) Inspections may be made at any place where cigarettes are sold, offered for sale, or stored or at any site where there is evidence of a violation of subdivision (a) of Section 14951.

(b) Manufacturers, distributors, wholesalers, and retailers shall permit an employee of the board, upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of, any building, facility, site, or place described in subdivision (a).

(c) Any person that refuses to allow an inspection authorized under this section is subject to the penalty imposed by Section 14958.

14957. Upon discovery by the board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of subdivision (a) of Section 14951, the board or that law enforcement agency may seize those cigarettes possessed in violation of this part.

14958. Any person who knowingly fails or refuses to allow an inspection by the board, pursuant to Section 14956, is subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each failure or refusal.

14959. This part shall cease to be applicable if federal fire safety standards for cigarettes that preempt this act are enacted and take effect subsequent to the effective date of this act and the State Fire Marshal so notifies the Secretary of State.

14960. This part shall become operative on January 1, 2007.

SEC. 3. (a) The Cigarette Fire Safety and Firefighter Protection Fund is hereby created in the State Treasury. Upon appropriation by the Legislature, moneys deposited into the fund shall be made available to both of the following:

(1) The State Board of Equalization to offset minor administrative costs for inspecting, seizing, and disposing of cigarettes.

(2) The State Fire Marshal to offset minor administrative costs to implement Part 8 (commencing with Section 14950) of Division 12 of the Health and Safety Code and to offset administrative costs to meet the fire safety reporting requirements established pursuant to Section 13110.5 of the Health and Safety Code.

(b) This section shall become operative on January 1, 2007.

EXHIBIT C

STATE FIRE MARSHAL CERTIFICATION, TESTING AND MARKING

The Act requires each cigarette manufacturer to submit a written certification to the State Fire Marshal attesting that each cigarette listed in the certification:

- Has been tested in accordance with the American Society of Testing and Materials standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes," and
- Meets the specified performance standards.

Cigarettes certified by a manufacturer would require a marking on the packaging to indicate compliance. The marking would be required to be in 8-point type or larger and consist of one of the following:

- Modification of the Universal Product Code to include a visible mark printed at or around the area of that code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the Universal Product Code.
- Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette packaging or cellophane wrap.
- Printed, stamped, engraved, or embossed text on the cigarette packaging that indicates that the cigarettes meet California standards.

Before a certified cigarette can be sold in the state, a manufacturer would be required to submit its proposed marking to the State Fire Marshal. The State Fire Marshal is required to approve the marking upon a finding that it is compliant with the marking criteria. Proposed markings would be deemed approved if the State Fire Marshal fails to act within 10 business days of receiving a proposed marking. A marking in use and approved for the sale of cigarettes in New York would be deemed approved. A manufacturer would only be allowed to use one marking and apply that marking uniformly for all packaging, including, but not limited to, packages, cartons, and cases, and brands marketed by that manufacturer. A manufacturer who modifies its marking would be required to notify the State Fire Marshal of this change and submit to the State Fire Marshal a copy of the new marking, as specified.

EXHIBIT D



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE ENROLLED BILL ANALYSIS

Date Amended:	Enrolled	Bill No:	AB 178
Tax:	California Cigarette Fire Safety	Author:	Koretz, et. al.
Related Bills:			

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

Among other things, this bill would authorize an employee of the Board of Equalization (Board), upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of any site where there is evidence of a violation of specified requirements of the Cigarette Fire Safety and Firefighter Protection Act (Act).

ANALYSIS

Current Law

Under existing law, the Board administers the **Cigarette and Tobacco Products Tax Law**. An excise tax of \$0.87 per package of 20 cigarettes is imposed on the distribution of cigarettes in this state.

Section 30435 of the Cigarette and Tobacco Products Tax Law authorizes an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and conduct an inspection of, any of the following:

- Any building, facility, site, or place at which cigarette or tobacco products are sold, produced, or stored; or
- Any building, facility, site, or place for which there is evidence of either the evasion of the cigarette or tobacco products taxes, or the failure to comply with the requirements of the Master Settlement Agreement, as defined.

Any inspection performed must be performed in a reasonable manner and at a reasonable time, taking into consideration the normal business hours of the building, facility, site, or place that is inspected. Any person that refuses to allow an inspection is subject to a fine not to exceed one thousand dollars (\$1,000) for each offense.

Section 30436 authorizes the Board to seize cigarettes and tobacco products under specified conditions, which includes, but is not limited to, cigarettes not contained in packages to which the California cigarette tax stamp is affixed or tobacco products upon which the surtax has not been paid. Upon seizure, those items become the property of the state.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position

Upon the administrative seizure and forfeiture of cigarettes, the Board is required to give notice to all persons known by the Board to have any right, title or interest in the property. In addition, notice of seizure and forfeiture must be given on the Board's Web site, as specified, if the seizure involves 61 cartons of 200 or more cigarettes.

Any person owning or claiming any interest in the cigarettes may file a verified petition with the Board stating his or her interest in the property and requesting the release or recovery of the property on the grounds that property was erroneously or illegally seized. The petition must be filed within 20 days from the date of the personal service upon him or her or the date of the mailing of the notice. Any person not served personally or by mail, however, must file the petition within 20 days from the date of publication of the notice. The failure of any such person to file a timely verified petition constitutes a bar to his or her right to any interest in the property, unless otherwise provided.

Petitions for release or recovery of seized cigarettes generally appear before the Board by the next scheduled Board Meeting if the 20-day petition period has elapsed. At that point, the Board determines whether the cigarettes were erroneously or illegally seized. If the Board finds that the cigarettes were erroneously or illegally seized, it is required under current law to order the release of the property. However, if the Board denies the petition for the release or recovery of the property, notice of the denial is mailed (within five days) to the petitioner and the Board then destroys the seized cigarettes.

The Board also administers the **Cigarette and Tobacco Products Licensing Act of 2003** (Licensing Act), which requires the licensure of cigarette and tobacco products distributors, wholesalers and retailers, and cigarette manufacturers and importers.

The Licensing Act authorizes any peace officer, or Board employee granted limited peace officer status, upon presenting appropriate credentials, to enter any place, as described, and to conduct inspections. Such inspections must be conducted in a reasonable manner and at times that are reasonable under the circumstances, taking into consideration the normal business hours of the place to be entered, and must be requested or conducted no more than once in a 24-hour period. Any person that refuses to allow an inspection is subject to a misdemeanor, punishable by a fine not to exceed five thousand dollars (\$5,000), or imprisonment not exceeding one year in a county jail, or both the fine and imprisonment.

The Board also has the authority to seize cigarettes and tobacco products under the Licensing Act. With the exception of cigarettes and tobacco products seized and forfeited for continued sales after notification of suspension or revocation, the seizure and forfeiture of such products under the Licensing Act must comply with the seizure and forfeiture procedures set forth in the Cigarette and Tobacco Products Tax Law.

Proposed Law

This bill would add Part 8 (commencing with Section 14950) to Division 12 of the Health and Safety Code as the California Cigarette Fire Safety and Firefighter Protection Act (Act).

CERTIFICATION, TESTING AND MARKING

This bill would require each cigarette manufacturer to submit a written certification to the State Fire Marshal attesting that each cigarette listed in the certification:

- Has been tested in accordance with the American Society of Testing and Materials standard E2187-04, "Standard Test Method for Measuring the Ignition Strength of Cigarettes," and
- Meets the specified performance standards.

Cigarettes certified by a manufacturer would require a marking on the packaging to indicate compliance. The marking would be required to be in 8-point type or larger and consist of one of the following:

- Modification of the Universal Product Code to include a visible mark printed at or around the area of that code. The mark may consist of alphanumeric or symbolic characters permanently stamped, engraved, embossed or printed in conjunction with the Universal Product Code.
- Any visible combination of alphanumeric or symbolic characters permanently stamped, engraved, or embossed upon the cigarette packaging or cellophane wrap.
- Printed, stamped, engraved, or embossed text on the cigarette packaging that indicates that the cigarettes meet California standards.

Before a certified cigarette can be sold in the state, a manufacturer would be required to submit its proposed marking to the State Fire Marshal. The State Fire Marshal is required to approve the marking upon a finding that it is compliant with the marking criteria. Proposed markings would be deemed approved if the State Fire Marshal fails to act within 10 business days of receiving a proposed marking. A marking in use and approved for the sale of cigarettes in New York would be deemed approved. A manufacturer would only be allowed to use one marking and apply that marking uniformly for all packaging, including, but not limited to, packages, cartons, and cases, and brands marketed by that manufacturer. A manufacturer who modifies its marking would be required to notify the State Fire Marshal of this change and submit to the State Fire Marshal a copy of the new marking, as specified.

GENERAL REQUIREMENTS

This bill would prohibit a person from selling, offering, or possessing for sale in this state cigarettes not in compliance with the following requirements:

- The cigarettes are tested by the manufacturer in accordance with the prescribed test method.
- The cigarettes meet the performance standard, as specified.
- The cigarettes meet the marking requirement.
- The manufacturer files a written certification with the State Fire Marshal.

Distributors, wholesalers, or retailers would not be prohibited from selling their inventory of cigarettes existing on January 31, 2007, if they can establish that California tax stamps or meter impressions were affixed to the cigarettes before January 1, 2007, and that the inventory was purchased before January 1, 2007, in comparable quantity to the inventory purchased during the same period of 2005.

In addition, a person or entity would not be prohibited from manufacturing or selling cigarettes if the cigarettes are or will be stamped or metered for sale in another state or are packaged for sale outside the United States.

PENALTIES

Any manufacturer or any other person or entity that knowingly sells or offers to sell cigarettes other than through retail sale in violation of the Act would be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each sale.

Any retailer, distributor, or wholesaler that knowingly sells or offers to sell cigarettes in violation of this part would be subject to the following:

- A civil penalty not to exceed five hundred dollars (\$500) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale does not exceed 50 packages of cigarettes.
- A civil penalty not to exceed one thousand dollars (\$1,000) for each sale or offer for sale in which the total number of cigarettes sold or offered for sale exceeds 50 packages of cigarettes.

The civil penalties would be deposited in the Cigarette Fire Safety and Firefighter Protection Fund.

In addition to any other penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership, or association engaged in the manufacture of cigarettes that knowingly makes a false certification would be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each false certification.

Any person violating any other provision in this part would be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation. Any cigarettes that have been sold or offered for sale that do not comply with the performance standard would be deemed contraband and subject to seizure and disposal by the Board or a law enforcement agency.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the Board's formal position.

It would be a defense in any action for civil penalties that a distributor, wholesaler, retailer, or any person in the stream of commerce relied in good faith on the manufacturer's marking that the cigarettes comply with the requirements of the Act.

ENFORCEMENT

Manufacturers, distributors, wholesalers, and retailers would be required to permit an employee of the Board, upon presentation of the appropriate identification and credentials, to enter into, and to conduct an inspection of, any building, facility, site, or any place where cigarettes are sold, offered for sale, or stored or at any site where there is evidence of a violation of specified requirements of the Act.

Any person that refuses to allow an inspection would be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each failure or refusal.

Upon discovery by the Board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of specified compliance requirements of the Act, the Board or that law enforcement agency would be authorized to seize those cigarettes possessed.

The Act would cease to be applicable if federal fire safety standards for cigarettes that preempt this Act are enacted and take effect subsequent to the effective date of this act and the Board so notifies the Secretary of State.

FINANCIAL PROVISIONS

This bill would create the Cigarette Fire Safety and Firefighter Protection Fund in the State Treasury. Upon appropriation by the Legislature, moneys deposited into that fund would be made available, in part, to the Board to offset minor administrative costs for inspecting, seizing, and disposing of cigarettes.

DEFINITIONS

This bill would define the following terms:

- "Cigarette" - a cigarette as defined in Section 30003 of the Revenue and Taxation Code.
- "Distributor" - a distributor as defined in Section 30011 of the Revenue and Taxation Code.
- "Manufacturer" - any of the following:
 - An entity that manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced anywhere that manufacturer intends to be sold in the state, including cigarettes intended to be sold in the United States through an importer.
 - The first purchaser anywhere that intends to resell in the United States cigarettes manufactured anywhere that the original manufacturer or maker does not intend to be sold in the United States.

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- An entity that becomes a successor of an entity, as described.
- "Offer to sell" - to offer or agree to sell.
- "Package" - package as defined in Section 30015 of the Revenue and Taxation Code.
- "Retailer" - a person who engages in the sale of cigarettes, but not for the purpose of resale.
- "Sale" or "sell" - any transfer, exchange, or barter, in any manner or by any means whatever, or any agreement for these purposes. The giving of cigarettes as samples, prizes, or gifts, and the exchanging of cigarettes for any consideration other than money are considered sales.
- "Stamp and meter impression" - stamp and meter impression as defined in Section 30018 of the Revenue and Taxation Code.
- "Wholesaler" - a wholesaler as defined in Section 30016 of the Revenue and Taxation Code.

The bill would become operative January 1, 2007.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to increase the safety of cigarettes sold in California by prohibiting sales of cigarettes that do not meet established fire safety standards. This bill is modeled on a New York State law that became effective in June 2004. According to the National Fire Protection Association (NFPA), cigarettes are the leading cause of fire-related injuries and death nationwide. Each year 1,000 people die and another 4,000 are injured in cigarette-related fires.
2. **Key amendments.** The **August 31, 2005, amendments** specify that cigarettes not in compliance with specified requirements of the Act are subject to seizure by the Board or a law enforcement agency. **The August 24, 2005, amendments** impacting the Board 1) specify that cigarettes sold or offered for sale not meeting the performance standard are subject to seizure and disposal by the Board or a law enforcement agency, 2) clarify that an employee of the Board is authorized to conduct inspections at any site where there is evidence of a violation of specified requirements of the Act, and 3) make other technical changes.

The August 16, 2005, amendments require a cigarette manufacturer to submit certifications, testing data, and modified markings to both the State Fire Marshal and the Attorney General, and require proposed markings to be submitted only to the State Fire Marshal. These amendments do not impact the Board.

The **June 23, 2005, amendments** provide for a January 1, 2007, operative date for the Act. The **June 16, 2005, amendments** delete the requirement for the approval of a proposed marking and require a manufacturer to submit its proposed marking to the Attorney General before a certified cigarette can be sold in the state. The amendments also remove the Bureau of Home Furnishings and Thermal Insulation from the bill and make other technical changes. These amendments do not impact the Board.

3. **Only cigarettes not meeting the performance standard are subject to disposal by the Board or a law enforcement agency.** This measure would allow the Board or a law enforcement agency to seize cigarettes upon discovery that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of subdivision (a) of Section 14951. Subdivision (a) of Section 14951 provides, in part:

14951. (a) A person shall not sell, offer, or possess for sale in this state cigarettes not in compliance with the following requirements:

(1) The cigarettes are **tested** by the manufacturer in accordance with the test method prescribed in subdivision (a) of Section 14952.

(2) The cigarettes **meet the performance standard** specified in subdivision (b) of Section 14952.

(3) The cigarettes **meet the marking requirement** of Section 14954.

(4) **A written certification is filed by the manufacturer** with the State Fire Marshal in accordance with Section 14953.

However, the bill would only allow the Board or a law enforcement agency to dispose of the seized cigarettes if they do not comply with the **performance standard** (Section 14955(e)). As such, the Board cannot dispose of cigarettes that do not meet the marking requirement, or for which a written certification has not been submitted to the State Fire Marshal. How would the Board know if a seized package of cigarettes meets the performance standard? Does the Board rely on the certification that was filed with the State Fire Marshal that describes, in part, the brand and style of the cigarette? What if a certification was not filed with the State Fire Marshal, but the cigarettes do meet the performance standard? Does the Board rely on performance standard information provided by the cigarette manufacturer? What if the brand and style is listed in a certification filed with the State Fire Marshal, but the cigarettes seized were meant to be sold in a state that does not have cigarette fire safety standards? Under such a scenario, that particular package of cigarettes would not meet the performance standards. Would that package of cigarettes not be subject to disposal because the brand and style meet the performance standard? Or would they be subject to disposal because that specific package of cigarettes does not meet the performance standard, and how would the Board know? And what would become of the cigarettes seized under this measure where the Board is not authorized to dispose of such cigarettes? Without a forfeiture provision or other statutory direction, it appears the cigarettes would be returned to the person from whom they were seized.

The following language is suggested to address this concern:

14957. Upon discovery by the board or a law enforcement agency that any person offers or possesses for sale, or has made a sale of, cigarettes in violation of subdivision (a) of Section 14951, the board or that law enforcement agency may seize those cigarettes possessed in violation of this part. Any cigarettes seized by the board or by a law enforcement agency shall be deemed forfeited.

4. **What agency is responsible for the collection of penalties?** This measure would impose civil penalties upon persons that knowingly sell or offer to sell cigarettes in violation of the Act, are engaged in the manufacture of cigarettes that knowingly make a false certification, or are in violation of any other provision of the Act. In addition, any person who knowingly fails or refuses to allow an inspection by the Board would be subject to a civil penalty for each failure or refusal. However, this measure does not specify an agency responsible for the collection of the penalties imposed. Based on discussions with the author's office, staff understands that collection would be administered by an agency other than the Board.
5. **Is this measure enforceable?** With ambiguity related to the final disposition of cigarettes seized under the Act, combined with the fact that the bill does not specify an agency to collect the penalties or any administrative provisions for that collection, it is questionable how this measure would be enforced. Without proper enforcement, would the bill accomplish the intent provided in the Legislative findings and declarations "to reduce the likelihood that cigarettes will cause fire, which results in deaths, injuries, and property damage?"
6. **Should the State Fire Marshal maintain an online directory of certified cigarettes by manufacturer?** This bill would require manufacturers certifying cigarettes to provide a copy of the certifications to all distributors and wholesalers to which they sell cigarettes. Manufacturers would also be required to provide sufficient copies of an illustration of the cigarette packaging marking utilized by the manufacturer for each retailer to which the distributors and wholesalers sell cigarettes.

Consideration should be given to replace the requirement of providing copies with a requirement that the State Fire Marshal post on its Web site cigarettes certified by the manufacturer, as well as an illustration of the marking utilized by the manufacturer. This suggestion would provide manufacturers, distributors, and wholesalers with an efficient manner to verify certified cigarettes and approved markings, as well as provide Board staff the information necessary to conduct inspections of cigarettes to ensure compliance with the Act. Without an online directory, a provision should be added to the bill to require the State Fire Marshal to promptly notify the Board of cigarettes certified by a manufacturer and provide illustrations of approved markings, as well as any updates to such certifications or markings.

7. **Could inspections be conducted concurrently with the Board's current inspection program?** The inspections provided under this bill would be conducted at the same time as inspections under the Cigarette and Tobacco Products Tax Law and Licensing Act since both involve the examination of packages of cigarettes. As such, the provisions of this bill that authorize the Board to conduct inspections to ensure compliance with the Act, and to seize cigarettes in violation of the Act, would not be problematic to administer.

COST ESTIMATE

The Board would incur costs to seize and destroy cigarettes that are in violation of the Act. A detailed cost estimate of this workload is pending; however, it is estimated that such costs would be minor (over \$10,000 and under \$50,000). The Board's administrative costs would be offset with moneys deposited into the Cigarette Fire Safety and Firefighter Protection Fund.

REVENUE ESTIMATE

The provisions of this bill could have a negative impact on the state excise tax collected on sales of cigarettes and also on sales and use taxes collected if consumers quit smoking or begin to purchase cigarettes from out-of-state sellers as a result of this bill. However, the Board has no way of measuring the potential impact this bill may have, and therefore, cannot provide an estimate at this time.

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